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Recent Cases

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LOSS OF CONSORTIUM—A CHILD IS NOT ENTITLED TO RECOVER FOR LOSS OF CONSORTIUM OF INJURED PARENT—*Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

In 1972 Patricia Borer was injured when a lighting fixture in the American Airlines passenger terminal at Kennedy Airport fell and struck her. Mrs. Borer's nine children filed a complaint alleging causes of action predicated upon negligence, breach of warranty, and manufacture of a defective product against American Airlines and two companies which manufactured and assembled the lighting fixture. The children each sought damages of $100,000, alleging that as a result of their mother's physical injuries, they had been deprived of her "services, society, companionship, affection, tutelage, direction, guidance, instruction and aid in personality development, all with its accompanying psychological, educational and emotional detriment."[1] American demurred to the complaint for failure to state a cause of action. The trial court sustained the demurrer without leave to amend and entered judgment dismissing the suit as to American.

In accepting the childrens' appeal, the California Supreme Court noted that, since *Rodriguez v. Bethlehem Steel Corp.*,[2] the courts of appeal had divided on the question of whether or not to recognize a new cause of action for loss of consortium in a parent-child relationship.[3] The court granted a hearing in the present case, and its companion case, *Baxter v. Superior Court*,[4] in which parents were seeking recovery for a loss of

1. 19 Cal. 3d 441, 445, 563 P.2d 858, 861, 138 Cal. Rptr. 302, 305 (1977).

2. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974). *Rodriguez* provided that a married person, whose spouse had been injured by the negligence of a third party, could maintain an independent cause of action for loss of consortium. In *Rodriguez*, the court defined consortium as the "loss of conjugal fellowship and sexual relations" and noted that it also included love, companionship, society and household services. *Id.* at 385, 525 P.2d at 670, 115 Cal. Rptr. at 766.

3. Two decisions held that a child has no cause of action for loss of parental consortium. *See* Garza v. Kantor, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976); Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (1975). Conversely, two decisions concluded that a parent can state a cause of action for loss of a child's consortium. *See* Mobaldi v. Regents of the Univ. of Cal., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976); Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975) (dictum).

4. 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977). In *Baxter*, a 16 year old male was rendered unconscious and remained comatose for four months as a result

child's consortium, to settle this issue.

The two questions before the court were: first, does a parent-child relationship establish a basis for a tort claim for loss of consortium; and second, does a denial of a cause of action for loss of consortium based on a parent-child relationship violate equal protection of the law?

In deciding that a parent-child relationship could not be the basis for a tort claim for loss of consortium, the court rejected the childrens' analogy to the spousal consortium recognized in *Rodriguez*. The court emphasized that *Rodriguez* did not compel a conclusion that a foreseeable injury to a legally recognized relationship necessarily postulates a cause of action. The court expressed a major concern that social policy must at some point intervene to delimit a tortfeasor's liability.[5]

In drawing this line to exclude parent-child consortium claims, the court examined the various policy factors which militated against recognizing a new cause of action. These included the inadequacy of monetary damages to compensate for loss of parental guidance and support, the difficulty of measuring the intangible character of the loss suffered by the child, and the increased social burden *(i.e.,* increased insurance premiums) which would be borne by the public.[6]

Although the social policy argument was pivotal in rejecting a cause of action for parental consortium, the court added that each claim of intangible loss should be judged on its own merit. Thus, claims based on a spousal relationship may be justified as *Rodriguez* indicated without an extension of liability to more remote relationships. The court pointed out three distinguishing features which rationally singled out the spousal relationship for extraordinary treatment. First, the court noted that impairment of the sexual life of the spouses was unique to the spousal consortium claim. Second, the court reasoned that the spousal cause of action did not pose the threat of the multiplicity of suits, increased litigation costs, or magnified

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of a general anasthesia given to him in preparation for surgery. Upon his awakening it was discovered that he had been reduced to the mental age of three, had suffered a total loss of sight and developed a severe hearing impairment, and partial paralysis of his right side had occurred. The parents' second amended complaint asserted four causes of action, the third and fourth of which sought damages on behalf of the parents for the loss of their son's support, society and comfort. In *Baxter,* the court decided a parent has no cause of action in negligence for the loss of filial consortium. The decision in *Baxter* was, as in *Borer,* 5 to 1, with Justice Mosk dissenting.

5. 19 Cal. 3d at 446, 563 P.2d at 862, 138 Cal. Rptr. at 305.

6. *Id.* at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.

liability which could result from the parental consortium claim because of the number of children. Finally, the court noted that the case law in over thirty sister states recognized that spousal claims and parental claims merited differing treatment.[7]

The court also rejected the childrens' claim that a denial of their cause of action would be inconsistent with trends in tort law which recognize intangible loss for pain and suffering. The court pointed out that the landmark cases of *Rowland v. Christian*[8] and *Tarasoff v. Regents of the University of California*[9] did not involve creation of a new cause of action "attended with problems of multiplication of claims and liability."[10] More importantly the court commented that in those cases, unlike the present case, the plaintiffs' suffered physical injuries, in addition to their intangible losses.[11]

Additionally, the children contended that rejection of a cause of action for loss of parental consortium denied them equal protection under the law. They based this argument on California Code of Civil Procedure section 377, which sets out the cause of action for wrongful death.[12] The children noted that the judicial decisions interpreting this statute have allowed recovery for loss of parental affection and society. Thus, they maintained that the wrongful death action was unconstitutionally underinclusive because of the distinction drawn between parents who die and those who survive.

In confronting this issue, the court examined the differences between claims for wrongful death and wrongful injury and found "two significant distinctions."[13] Both distinctions stemmed from the fact that the injured parent who survives may maintain a cause of action. First, the court reasoned that, in a wrongful injury action unlike a wrongful death action, the injured victim of a negligent tortfeasor was able to maintain a personal cause of action for the injuries suffered; thus a claim by the child was not essential to prevent the tortfeasor from escaping liability. Second, the court pointed out that the wrongful death action was the deprived family's only means of compensation for loss of parental care and services; whereas an

7. *Id.* at 448-49, 563 P.2d at 863-64, 138 Cal. Rptr. 307-08.
8. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
9. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1977).
10. 19 Cal. 3d at 450, 563 P.2d at 864, 138 Cal. Rptr. at 308.
11. *Id.*
12. CAL. CIV. PROC. CODE § 377 (West 1973).
13. 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. 309.

injured parent could claim compensation for the child's loss of consortium as part of the parents' own cause of action. Consequently, the court determined that recovery for loss of affection and society in a wrongful death action fulfilled a social need, thus providing the statute with a rational basis sufficient to meet equal protection standards.[14]

In a highly critical dissent, Justice Mosk pointed out that the majority's decision disregarded recent trends in tort law and ignored every argument which was advanced in *Rodriguez* to extend liability. Further, he argued that contrary to what the majority concluded, *Rodriguez* did hold that loss of consortium is principally a form of mental, and not physical suffering. Thus, he reasoned that loss of consortium was properly viewed as an intangible but compensable loss—one which could be evaluated in the context of the parent-child relationship.[15]

In *Borer v. American Airlines, Inc.*, the California Supreme Court was confronted with a delicate problem: how to shore up the floodgates holding back a reservoir of potential litigants without overruling *Rodriguez*. The court accomplished this task by confining intangible recovery to those situations in which the social benefits outweigh the social burdens.

Significantly, *Borer* can be viewed as a break in the trend established by cases such as *Dillon v. Legg*,[16] *Rowland*, *Rodriguez*, and *Tarasoff* that have expanded the number of situations in which nonphysical injuries are compensable. In this respect, *Borer* reflects contemporary public reaction to the much-publicized, enormous damage recoveries by a few injured plaintiffs, and the public's desire to put a check on those recoveries. However, whether *Borer* signals an across the board retreat from the trend which continually expanded tort liability remains to be seen.

Bruce Burns

14. *Id.* at 452-53, 563 P.2d at 866, 138 Cal. Rptr. at 310.
15. *Id.* at 453-60, 563 P.2d at 866-71, 138 Cal. Rptr. at 310-15.
16. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

DELINQUENT CHILDREN — IT IS IMPROPER FOR A JUVENILE COURT TO USE A CONTEMPT ORDER TO BOOTSTRAP JUVENILE STATUS OFFENDER TO STATUS OF UNDERAGE CRIMINAL LAW VIOLATOR—*In re Ronald S.*, 69 Cal.App.3d 866, 13 Cal.Rptr. 387 (1977).

Ronald S., a thirteen year old "status offender,"[1] was declared a ward of the juvenile court under the power granted by Welfare & Institutions Code section 601.[2] He was sent to a nonsecure community crisis center and ordered to stay there. However, he ran away the day of his arrival and as a result, a petition was filed under Welfare & Institutions Code section 602,[3] charging him with contempt of court in violation of a penal statute.[4] The petition was granted and Ronald was ordered detained at a juvenile hall. He subsequently filed a writ of habeas corpus with the court of appeal, contesting the 602 petition.

In ruling on the habeas petition, the court of appeal focused on the efforts of a juvenile court judge to cope with certain unanticipated problems resulting from well-intentioned, but unworkable, amendments to California's juvenile law. Prior to 1976, a major defect in the juvenile law was that it often resulted in the intermingling during detention of 601 status offenders with 602 underage criminal law violators. Typically, a minor who had been declared a ward of the court as a status offender was placed in a foster home. If he ran away, the juvenile was disobeying an order of the court—a criminal of-

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1. Basically a "status offender" is one who has committed an act which would not constitute an offense if committed by an adult. *See* CAL. WELF. & INST. CODE § 601 (West Supp. 1977).

2. CAL. WELF. & INST. CODE § 601 (West Supp. 1977) provides in pertinent part:
> (a) Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, or custodian, or who is beyond the control of such person, or who is under the age of 18 years when he violated any ordinance of any city or county of this state establishing a curfew based solely on age is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

3. CAL. WELF. & INST. CODE § 602 (West Supp. 1977) provides:
> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

4. Contempt of court is a misdemeanor and is defined as "[w]illful disobedience of any process or order lawfully issued by any Court." CAL. PENAL CODE § 166(4) (West 1970).

fense. Consequently, he would be elevated to 602 status. This bootstrapping of a mere status offender into an underage criminal law violator resulted in his being sent to the California Youth Authority (CYA).

In 1976, the California legislature apparently remedied this flaw in the procedures for handling juveniles by prohibiting the intermingling of 601's and 602's in juvenile halls and by removing the bootstrapping proviso. In providing the remedy, however, the new law created an unforeseen administrative problem that threatens to turn the legislative effort into a disaster. The law prevents contact between 601 and 602 detainees by mandating that the former are to be confined in nonsecure institutions only.[5] Unfortunately, this legislative solution failed to consider the difficulties involved in detaining runaways, who comprise the majority of the 601 status offenders found in such institutions.[6]

As he had with previous 601 runaways, juvenile court Judge Raymond Vincent attempted to cope with the statutorily-created dilemma by ordering Ronald S. to stay put when sent to a nonsecure crisis resolution center. When Ronald disobeyed that order, the judge elevated him to 602 status for contempt and directed that he be placed in juvenile hall.

Although the appellate court recognized the administrative difficulties faced by the juvenile courts as a result of the inadequacies of the 1976 law, it granted Ronald S. his writ of habeas corpus. The court found that the juvenile court judge's basis for the 602 petition undermined the legislature's intent by indirectly applying the bootstrapping technique that had been specifically eliminated. In spite of any defects in the law, the

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5. *See* CAL. WELF. & INST. CODE § 507 (West Supp. 1977), which provides in relevant part:

> (b) [N]o minor shall be detained in any jail, lockup, juvenile hall, or other secure facility who is taken into custody solely upon the ground that he is a person described by Section 601 or adjudged to be such or made a ward of the juvenile court solely upon that ground. If any such minor is detained, he shall be detained in a sheltered-care facility or crisis resolution home as provided for in Section 654, or in a nonsecure facility provided for in subdivision (a), (b), (c), or (d) of Section 727.

6. The appellate court in *In re* Ronald S. noted the gravity of the runaway problem:

> Placing a runaway in a nonsecure environment is something of an exercise in futility. To put it quite as succinctly as possible, 601's began to scatter like a covey of quail. As a result, the junenile court judges of this state lost control of the situation and as an inevitable result, parents, police and the public became increasingly irate.

In re Ronald S., 69 Cal. App.3d 866, 872, 138 Cal. Rptr. 387, 391 (1977).

court observed that it was inappropriate to impugn the wisdom of the legislature.[7]

However, the court strongly urged the legislature to take action to resolve the dilemma and suggested three alternative solutions. First, the court proposed that status offenders be eliminated from the state legislative scheme entirely and turned over to local authorities. Second, it suggested that the 601 problem be removed to a state agency, which would not have the coercive power of a court but would set up facilities where a runaway could voluntarily receive temporary shelter and counseling. Finally, the court proposed that the present law be modified to permit secure confinement of the status offenders only in specific circumstances. This alternative would provide a partial solution to the runaway dilemma, while avoiding the instances of intermingling previously found offensive.[8]

In re Ronald S. illustrates how one small but clearly worded command of the legislature has served to undermine the benefits of the very law it enacted. The decision reflects a judicial reluctance to sanction a means of skirting legislative direction, but indicates the court's concern with the issue through its urgent message to the legislature. As a result of the decision to grant Ronald his writ of habeas corpus, the runaway dilemma will persist until the legislature takes action on this question.

Of the three alternatives presented by the court, implementing the third would involve the least administrative difficulty. Simply by securing some of the existing nonsecure facilities and designating them for runaway status offenders only, the remaining 601's would still have nonsecure settings, and the separation of 601's and 602's would continue.

While this solution may be the most practical, it may not be the most satisfactory, for unless runaways are given beneficial counseling they will continue to run. Additionally, the cost to society of forcibly apprehending runaways and processing them through the judicial system is phenomenal.[9] Simi-

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7. The court observed that:

> As the law now stands, the Legislature has said that if a 601 wants to run, let him run. While this may be maddening, baffling and annoying to the juvenile court judge, ours is not to question the wisdom of the Legislature.

8. *Id.* at 874, 138 Cal. Rptr. at 392.

9. The FBI statistics for 1976 indicate that the total number of juveniles arrested as runaways in the United States was 166,529. UNIFORM CRIME REPORT FOR THE UNITED STATES (1976), ISSUED BY CLARENCE M. KELLEY, DIRECTOR, *FBI*, Sept. 28, 1977.

larly, the removal of status offenders from the state legislative scheme seems too radical an abdication of state responsibility to be a viable alternative. Therefore, the establishment of a state agency to provide for the needs of minors on a volunteer basis may prove to be the most beneficial solution. It would ease the burden on the courts and society, and noncoercive counseling for the juvenile and his family would be more likely to reduce the tensions of the situations and thus be more effective.

Lynn Williams

CRIMINAL LAW—RIGHT OF CONFRONTATION—MERE ISSUANCE OF A WARRANT AND THE INTERVIEW OF A RELATIVE BY A PROSECUTOR IN ATTEMPT TO LOCATE ESSENTIAL WITNESS WILL NOT SATISFY DUE DILIGENCE REQUIREMENT—*People v. Enriquez*, 19 Cal. 3d 221, 561 P.2d 261, 137 Cal. Rptr. 171 (1977).

On two separate occasions, while armed with a deadly weapon, defendant Salvidor Ray Enriquez assaulted and seriously injured other individuals.[1] The first incident occurred while the defendant, Steven Lagunas and a group of friends were attending a public carnival. Attending the same carnival was a second group consisting of David Corona, Corona's brother and a friend. Lagunas approached David Corona and a fist fight between them ensued. Defendant joined the altercation and while armed with a linoleum knife stabbed David, cutting him a total of seven times.[2]

The second encounter took place on a summer evening while the defendant, Paul Prieto, and several others were standing outside of an apartment building. Alton Butler came out of the building armed with a knife and approached the group in a hostile manner. Butler swung the knife several times wounding the defendant. Butler then attacked Prieto, who was wounded while trying to defend himself. Butler then resumed his attack on the defendant. At some point, the knife changed hands and the defendant fatally stabbed Butler in the abdomen.[3] Approximately four hours later, the defendant was arrested.

Upon his arrest, defendant was charged with aggravated assault while armed with a deadly weapon in connection with

1. People v. Enriquez, 19 Cal. 3d 221, 226, 561 P.2d 261, 264, 137 Cal. Rptr. 171, 174 (1977).

2. Defendant and one other witness for the defense testified that he did not use a knife. Steven Lagunas told a police officer that the defendant had been carrying a linoleum cutting knife in his belt. At trial, however, Lagunas testified that the defendant *might* have had a linoleum cutting knife in his belt and that he *might* have told the officer that defendant stabbed the victim. *Id.* at 227, 561 P.2d at 264-65, 137 Cal. Rptr. at 174.

3. Defendant testified that after he had been cut on the arm and the side of the body he could not remember what happened. Paul Prieto testified at the preliminary hearing that defendant came into possession of the knife during the struggle and that defendant had stabbed Butler several times in the stomach area. Mrs. Prieto's testimony was the same as that of her son except that she stated she never saw a knife in defendant's hands. A fourth witness "testified in a manner suggesting that defendant had acted in self defense." *Id.* at 231-33, 561 P.2d at 267-69, 137 Cal. Rptr. at 177-79.

the first incident[4] and with murder while armed with a deadly weapon in connection with the second.[5] At the preliminary hearing on the murder charge, of the three eyewitnesses to the incident, Paul Prieto was the only one who testified that the defendant had stabbed Butler.[6] Three months later, during the trial of the consolidated charges, Prieto failed to appear. As a result, the District Attorney moved that Prieto's testimony, as recorded at the preliminary hearing, be read into evidence pursuant to California Evidence Code section 1291.[7] If certain preconditions are met, section 1291 renders admissable the former testimony of an unavailable witness.

The trial court found that these preconditions were met and admitted Prieto's recorded testimony. It noted that by issuing a bench warrant and questioning his mother about his whereabouts, the prosecution had exercised due diligence in attempting to locate Prieto and produce him in court. This ruling was made despite the fact that the prosecution offered no evidence on the issue of due diligence.[8] The trial resulted in the jury conviction of the defendant for assault with a deadly weapon and for voluntary manslaughter.[9]

The defendant appealed both convictions on a multiplicity of grounds,[10] one of which alleged that the admission of Prieto's

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4. *See* CAL. PENAL CODE § 217 (West 1970).

5. *See id.* § 187.

6. 19 Cal. 3d at 237-38, 561 P.2d at 271-72, 137 Cal. Rptr. at 181-82.

7. Evidence code § 1291 provides for the admissibility of prior testimony if the declarant is unavailable as a witness. Evidence code § 240 includes within the meaning of "unavailable as a witness" the following applicable definition: When the declarant is "absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process." CAL. EVID. CODE §§ 240, 1291 (West 1966).

8. 19 Cal. 3d at 234, 561 P.2d at 269, 137 Cal. Rptr. at 179.

9. *Id.* at 226 n.1, 561 P.2d at 264 n.1, 137 Cal. Rptr. at 174 n.1.

10. Defendant appealed on grounds of improper impeachment of a defense witness and improper instructions on self defense. These arguments were given little consideration by the court. *Id.* at 227-28, 561 P.2d at 265, 137 Cal. Rptr. at 175-76.

The court did consider defendant's challenge of the constitutionality of the procedures set out in People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975), for attacking an indeterminate sentence. *Wingo* held that it was not the responsibility of the judiciary to fix maximum terms and that habeas corpus was the proper remedy for challenging an indeterminate sentence. The *Enriquez* court expressed its approval of the *Wingo* rationale by specifically holding that the minimal requirements imposed by *Wingo* did not constitute a denial of due process. 19 Cal. 3d at 230, 561 P.2d at 266, 137 Cal. Rptr. at 176.

Defendant also challenged the manslaughter conviction on the ground that his confession was illegally obtained. The supreme court, reversing on the basis of the due diligence argument, never decided the *Miranda* issue. However, there are strong indications that Enriquez' extrajudicial statements were illegally obtained and that the

recorded testimony infringed the defendant's constitutional right to confront witnesses against him. In support of this allegation, he argued that the trial court had abused its discretion by concluding that the prosecution had exercised due diligence in attempting to locate the critical witness to the homicide.[11]

While recognizing that both the state and federal constitutions guarantee the right of a criminal defendant to confront witnesses against him, the California Supreme Court noted that this right was subject to limitation when the witness was unavailable. In confronting the issue of unavailability, the court looked to the test developed by the United States Supreme Court in *Barber v. Page.*[12] In *Barber,* the Supreme Court held that if a witness was unavailable, but had given testimony at a preliminary hearing and had been subject to cross examination, his prior recorded testimony could be admitted.[13] Further, the Court stated that a witness was not considered unavailable unless the prosecutorial authorities had made a good faith effort to obtain his presence at trial.[14]

In applying this test to the instant case, the California Supreme Court equated "good faith effort" with section 1291's requirement of due diligence.[15] The court found that the prosecution's efforts to locate Prieto, a key witness, did not meet the due diligence requirement.

The court observed that, though a bench warrant had been issued for Prieto, no attempt had been made to serve the warrant. Additionally, the court noted that no attempt had been made to locate Prieto on information otherwise available to the prosecution. For example, the prosecution knew that Prieto attended a particular high school but no action had been taken to locate him through the school. Similarly, the prosecution had information to the effect that Prieto might have been picking fruit in California, but made no effort to locate him through farm labor organizations. Further, the prosecution made no attempt to ascertain the names of Prieto's friends or acquaintances. Finally, the prosecution did not attempt to garner any precise information from the witness' mother and even failed

use of those statements at trial would have prompted reversal, notwithstanding the due diligence argument. *Id.* at 237-38, 561 P. 2d at 271-72, 137 Cal.Rptr. at 181-82.

11. 19 Cal. 3d at 226, 561 P.2d at 264, 137 Cal. Rptr. at 174.

12. 390 U.S. 719 (1968).

13. *Id.* at 722.

14. *Id.* at 724-25. *See also* Pointer v. Texas, 380 U.S. 400 (1965).

15. 19 Cal. 3d at 235, 561 P.2d at 270, 137 Cal. Rptr. 180.

to speak to her after Prieto's disappearance, though the trial was still two months away.[16]

In conclusion, the court observed that the record disclosed "casual indifference, not diligence" on the part of the prosecution in its efforts to locate Prieto.[17] The court acknowledged that the prosecution could reasonably have believed that none of the leads to Prieto's whereabouts would be productive. However, the court maintained that this premise did not mean that no effort need be made. Thus, the supreme court held that the trial court had abused its discretion in ruling that the proponent of the prior recorded testimony had used due diligence in attempting to locate the critical witness.[18]

In *People v. Enriquez,* the supreme court unanimously declared that the prosecution did not fulfill the due diligence requirement of the California Evidence Code by merely asking that a warrant issue on a key witness and then abandoning all efforts to serve it based simply on the belief that all potential sources of information would prove uncooperative.

Prior to *Enriquez,* the Second District Court of Appeal had issued its opinion in *People v. Salas.*[19] While applying essentially the same test utilized by the supreme court, the court of appeal found that the prosecutor's efforts to locate a key witness satisfied the due diligence requirement. The court noted that a warrant had been issued six weeks prior to trial; eight to ten attempts were made to serve the warrant; the wife and mother of the witness were contacted; the FBI and Department of Motor Vehicles were contacted; and finally an auto dealer who had sold the witness a car was interviewed. However, the attempts proved futile and the prior testimony of the witness was admitted at trial.[20]

While *Salas* can arguably be viewed as the outer limit of what constitutes due diligence, *Enriquez* provides an indication of what actions are not sufficient to meet the due diligence requirement. Thus, while an extensive search for a witness will clearly satisfy the requirement, an indifferent one clearly will not. Beyond this, however, *Enriquez* does not supply a definitive due diligence standard. The court set no precise guidelines nor did it present specific criteria by which to measure the

16. *Id.* at 236, 561 P.2d at 269, 137 Cal. Rptr. at 179.
17. *Id.* at 236-37, 561 P.2d at 271, 137 Cal. Rptr. at 181.
18. *Id.* at 237, 561 P.2d at 270-71, 137 Cal. Rptr. at 180-81.
19. 58 Cal. App. 3d 460, 129 Cal. Rptr. 871 (1976).
20. *Id.* at 470, 129 Cal. Rptr. at 877.

efforts of the District Attorney. At best, with *Salas* as one extreme and *Enriquez* as the other, there is now a smaller grey area within which the efforts of a prosecutor will succeed or fail.

Donald Allen

LIABILITY INSURANCE—PHYSICIAN ALLOWED TO SEEK RECOVERY FROM DAMAGES ARISING OUT OF WRONGFUL CANCELLATION OF MALPRACTICE INSURANCE POLICY—*Spindle v. Travelers Insurance Cos.*, 66 Cal. App. 3d 951, 136 Cal. Rptr. 404 (1977).

David K. Spindle, M.D., was a member of the Southern California Physicians Council. On January 1, 1974, he was issued a malpractice insurance policy pursuant to a "master contract" entered into between the council and Travelers Insurance Companies (Travelers). From January of 1974, until July of 1975 no malpractice claims were filed against Dr. Spindle. Nevertheless, on July 3, 1975, Travelers sent written notice to Dr. Spindle advising him of their intention to cancel his malpractice policy as of August 3, 1975. As a result, Spindle sued Travelers and a subsidiary for damages allegedly arising out of the wrongful cancellation of his policy.[1]

Spindle based his complaint on a clause within the insurance contract which permitted Travelers to cancel the policy for any reason upon which it chose to act. He maintained that this "absolute right" to cancel was governed by an implied covenant of good faith that the policy would not be cancelled for a malicious reason.[2] Spindle then contended that his policy was wrongfully cancelled in breach of this covenant, to serve as an example to the other council members who were currently in a dispute with Travelers over the allowable rate of premium increase provided for in the master contract.[3] Further, he asserted that this arbitrary cancellation injured his professional reputation and caused him to suffer emotional distress. He sought relief in the form of consequential, punitive, and special damages totaling in excess of twenty million dollars.[4]

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1. Spindle v. Travelers Ins. Cos., 66 Cal. App. 3d 951, 952-54, 136 Cal. Rptr. 404, 404-06 (1977).

2. *Id.* at 956, 136 Cal. Rptr. at 406.

3. *Id.* at 955, 136 Cal. Rptr. at 406. Spindle also alleged that during negotiations between the council and Travelers for the "master contract," he was informed and believed that Travelers said "that if its members 'complied with the conditions precedent' and did not have excessive claims filed against them, defendants would keep the members' malpractice policies in full force and effect." *Id.* at 954, 136 Cal. Rptr. at 405.

4. Spindle alleged that as a result of the cancellation, he was forced to secure replacement insurance from a carrier at a significantly higher premium. Specifically, he pled damages in the amount of $10,000,000 for emotional distress, $10,000,000 punitive, and $7,053.25 special (the last figure representing the difference in the prem-

Travelers demurred on the ground that Spindle had failed to state a cause of action. The trial court sustained the insurance companies' demurrer, and a judgment for dismissal was entered.[5]

In rejecting the trial court's conclusion, the court of appeal, per Judge Jefferson, accepted Spindle's allegations of bad faith as true, and proceeded to discuss whether a cause of action existed for malicious cancellation of an insurance policy.[6] The court noted that no statutory law existed that expressly limited the insurance companies' right to cancel Spindle's liability policy. However, the court stated it was clear from several sections of the California Insurance Code that the right of insurers to cancel insurance policies was not absolute in California. The court reasoned that these sections reflected a legislative policy "limiting the 'absolute right of insurance policy cancellation.' "[7]

In addition to the legislative policy, the court indicated that California decisional law generally implied a covenant of good faith and fair dealing in every contract such that "neither party will do anything which will injure the right of the other to receive the benefits of the agreement."[8] The court cited with approval several cases which had applied this covenant to insurance contracts.[9] Although these cases covered situations where the insured recovered damages based on the insurer's conduct in settling a claim against the policy, the court found their reasoning readily applicable to cancellation:

> We are unable to discern any logical basis for distinguishing between an insurer's conduct in settling a claim made pursuant to the policy and that involved in an insurer's cancelling a policy if bad-faith conduct is the basis for the cancellation. The situations are similar in that the ultimate result of the conduct of the insurer effectively

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ium paid the new insurer from August 26, 1975 to January 1, 1976 as opposed to what plaintiff would have paid defendants during the same time period). *Id.* at 955-56, 136 Cal. Rptr. at 406.

5. *Id.* at 953, 136 Cal. Rptr. at 405.

6. *Id.* at 957-58, 136 Cal. Rptr. at 407-08.

7. *Id.* at 957, 136 Cal. Rptr. at 407.

8. *Id.* at 957-58, 136 Cal. Rptr. at 407-08.

9. *See, e.g.*, Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958).

> deprives the insured of the benefit of his bargain, i.e., the coverage for the period for which he paid a premium.[10]

By adopting a deprivation of benefit focus, the court was able to look beyond the specific clauses of the agreement to what was being bargained for between insurer and insured. The court found that, in exchange for the payment of insurance premiums, the insured was seeking the peace of mind that comes with knowing that he will be covered for liabilities addressed to the insurance he purchased.[11] Thus, any company policy which culminated in the refusal to handle a claim, including a refusal based on wrongful cancellation, would deny the insured the benefit of the bargain he had made with his insurer. In the case at hand, then, the court concluded that a cause of action would exist if it could be shown that the cancellation of Spindle's policy had been the result of bad faith.[12]

Finally, the court focused on whether the alleged reasons for cancelling the policy evidenced the requisite bad faith on the part of Travelers and its subsidiary. The court characterized the "cancellation to set an example" as "conspiratorial conduct on the part of insurers to avoid . . . contractual liability" and concluded that if this were shown it would imply bad faith.[13]

Spindle v. Travelers Insurance Cos. reemphasizes the position of the California courts that the implied covenant of good faith and fair dealing in contractual relationships is an expression of the public policy of this state. In *Spindle,* this expression of policy was applicable to subject an insurer to liability to its insured for cancelling a malpractice insurance policy in accordance with the permissible terms of the policy, if that cancellation was in bad faith.

Spindle, then, gives rise to a new cause of action in tort for damages where an insurer has wrongfully cancelled an insured's medical malpractice policy, and the insured has been harmed thereby. In addition, it stands for the proposition that there are implied limitations governing any clause which purports to give the insurer the absolute right to cancel a liability insurance contract. These clauses are no longer freely discretionary, but subject to an implied covenant of good faith and fair dealing from the time of the making of the agreement.

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10. 66 Cal. App. 3d 951, 958, 136 Cal. Rptr. 404, 408 (1977).
11. *Id.*
12. *Id.*
13. *Id.*

COMMUNITY PROPERTY—INSURANCE AGENT'S VESTED FUTURE TERMINATION BENEFITS ARE COMMUNITY PROPERTY—*In re Marriage of Skaden,* 19 Cal. 3d 679, 566 P.2d 249, 139 Cal. Rptr. 615 (1977).

Gary and Heidrun Skaden were married in 1961. Beginning in 1965, Gary worked as an insurance salesman for State Farm Insurance Company. Gary and Heidrun separated in 1973, while Gary was still working for State Farm. They subsequently petitioned the court for dissolution of their marriage and a determination of their community property rights. At issue was whether the "termination benefits" provided for in Gary's employment contract were community property and subject to division between Gary and Heidrun.

The termination benefits consisted of installment payments to be made to Gary over a five year period after his termination from the company. Termination could be by written notice of the company, or by the death or written notice of the employee. The benefits were to be determined by percentages of net premiums, collected within a five year period after termination, on policies that were credited to the agent's account on the date of termination. Receipt of the benefits was also subject to a noncompetition clause. In other words, if Gary competed with State Farm after termination, his benefits would cease.[1]

The trial court found that the termination benefits were not divisible community property, but the separate property of Gary, because they were a mere expectancy and of no value since they were not capable of present computation.[2]

Heidrun appealed this judgment contending that the termination benefit was a vested right, analogous to a pension right, representing a form of deferred compensation for services rendered. She argued that this characterization subjected the termination benefit to division as community property to the extent that the compensation was for services performed by Gary during marriage.[3] Conversely, Gary maintained that the benefits were not deferred compensation, but were either consideration for his termination or consideration for his noncompetition with State Farm after termination.[4]

1. *In re* Marriage of Skaden, 19 Cal. 3d 679, 682-85, 566 P.2d 249, 249-51, 139 Cal. Rptr. 615, 615-17 (1977).

2. *Id.* at 685, 566 P.2d at 251, 139 Cal. Rptr. at 617.

3. *Id.*

4. *Id.* at 686, 566 P.2d at 252, 139 Cal. Rptr. at 618.

In rejecting Gary's contentions, the California Supreme Court relied heavily on its conceptual analysis in *In re Marriage of Brown,* a case concerning the community nature of a spouse's retirement pension right.[5] In *Brown,* the court determined that a benefit was vested when it survived "the discharge or voluntary termination of the employee" and it could not be unilaterally repudiated by the employer.[6] The *Brown* court also found that a vested right may be either "matured" or "immature." If the right was subject to no conditions, or if the conditions had been performed, it was vested and mature. If payment was subject to a condition, the right was vested but immature.[7]

Based on the foregoing definitions, in *Skaden* the supreme court reasoned that the termination benefit became vested, under the terms of Gary's employment contract, after Gary had been employed for two years. Additionally, the court found that Gary's benefit was subject to two conditions: termination and noncompetition. Since at the time of the dissolution Gary was still working for State Farm, the court concluded his benefit was vested but immature.[8]

Previous California case law had subjected vested but immature pension rights to division upon dissolution to the extent of their community character. As a result, the court focused on whether Gary's termination benefits could be analogized to similar pension rights, causing them to be divisible to the same extent.[9]

In resolving this issue, the court initially noted that the termination benefits grew out of the terms of the employment contract, and the amount of payment related directly to the number and character of policies credited to Gary's account. Thus, Gary was actually compensated for getting these accounts during his employment, and not for anything he did after employment. In light of these features, the court reasoned that the termination benefits were actually a form of deferred compensation comparable to a pension right. Therefore, to the extent which Gary was compensated for accounts which he obtained while he was married to Heidrun, the termination benefits were community property.[10]

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5. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).
6. *Id.* at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635.
7. *Id.*
8. 19 Cal. 3d at 685-86, 566 P.2d at 252, 139 Cal. Rptr. at 618 (1977).
9. *Id.* at 686, 566 P.2d at 252, 139 Cal. Rptr. at 618.
10. *Id.* at 687-88, 566 P.2d at 253, 139 Cal. Rptr. at 619.

After this determination, the court then considered the proper method for the division of the termination benefits. The court noted that if the parties could not come to an agreement on division it had two alternatives. On the one hand, it could determine the present value of the future benefits and divide them accordingly. On the other hand, it could continue jurisdiction over the proceedings until the benefits became due, and then divide them. Since selection of the proper alternative depended on the particular facts in the case, the supreme court left the method of division to the discretion of the trial court.[11]

Finally, the court stated that its decision should not apply retroactively to cases where the property rights of the marriage had been finally adjudicated, but would apply to any cases in which the property rights had not been adjudicated, in which such adjudication was still subject to appellate review, or in which the trial court had expressly reserved jurisdiction to divide termination benefits or the rights thereto.

In re Marriage of Skaden is in line with the California Supreme Court's recent trend extending community property rights into the area of benefits that will not mature until after the marriage has ended.[12] Clearly, this extension is consistent with basic community property principles. The termination benefits are certainly a product of community effort to the extent that they are derived from accounts obtained during marriage.

Although characterizing the benefits as community property is conceptually sound, it raises complex problems of valuation—a factor which did not go unnoticed in *Skaden*.[13] Present valuation of a future benefit can involve expensive actuarial computations. Additionally, if this present valuation leads to the current distribution of immature termination benefits, it can result in a windfall to the nonemployee spouse if the benefits never mature. Similarly, if the court continues jurisdiction over the proceedings to ensure vesting, the delay in delivery of benefits can inconvenience both the parties and the court. However, it seems arguable that these problems of timing and

11. *Id.* at 688-89, 566 P.2d at 253-54, 139 Cal. Rptr. at 619-20.

12. *See, e.g., In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Smith v. Lewis, 13 Cal. 3d 349, 355 n.4, 530 P.2d 589, 593 n.4, 118 Cal. Rptr. 621, 625 n.4 (1975); *In re* Marriage of Fithian, 10 Cal. 3d 592, 596 n.2, 517 P.2d 449, 451 n.2, 111 Cal. Rptr. 369, 371 n.2 (1974). *See also In re* Marriage of Hisquierdo, 19 Cal. 3d 618, 566 P.2d 224, 139 Cal. Rptr. 590 (1977).

13. *See* 19 Cal. 3d at 688-89, 566 P.2d at 254, 139 Cal. Rptr. at 620 (1977).

valuation should not stand in the way of an equitable result which can be fashioned by the trial judge based on the facts of the case. To hold otherwise, would defeat the nonemployee spouse's rightful interest in the community property.

Finally, it is worth noting that the *Skaden* decision leaves open the question of whether the termination benefit would be community property if Gary and Heidrun had separated before it had vested. However, if the court continues to analogize to pension rights the answer would be affirmative, for the court has held that nonvested pension rights are also community property.[14]

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14. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).